

## **REMARKS**

This paper is responsive to the nonfinal Office Action mailed October 23, 2006, relating to the above-identified application.

### **I. Prosecution History**

Applicant filed his application on April 13, 2001, with 83 original claims. On that same day, Applicant filed a Preliminary Amendment canceling claims 2-20, 22-43, 45-62, 64-67, 69-74, 76-78, and 80-83. The Examiner failed to consider this Preliminary Amendment when prosecution began and subsequently issued a Restriction Requirement on October 7, 2005.

On November 8, 2005, Applicant electing Group I, based on the restriction associated with claims 1-20. On February 10, 2006, the Examiner issued an Office Action acknowledging Applicant's election of Group I and addressed the merits of claims 1-20. Applicant filed a response on August 6, 2006 to the February 10, 2006, Office Action.

On October 23, 2006, the Examiner realized that claims 2-20 had been cancelled by way of the Preliminary Amendment and issued a new Office Action requesting Applicant to elect a new species. Claims 1, 21, 44, 63, 68, 75, and 79 remained pending in the application at that time.

### **II. The Current Restriction Requirement**

The Examiner issued a restriction requirement and Applicant is required to restrict the application to one of the following alleged inventions: Species I (claim 1), Species II (claim 21), Species III (claim 44), or Species IV (claims 63, 68, 75, and 79). The Examiner maintains and reinstates his initial request for

restriction under 35 U.S.C. § 121 to one of four distinct species found in Applicant's 83 claims. The Examiner is wrong.

Suggested species I and II are classified by the Examiner in the same class and subclass (i.e., class 455, subclass 445), and both relate to a method based on a testing system where users submit incoming queries after sending test specimens to a testing facility. The Examiner's statutory authority to require Applicant to restrict his application stems from 35 U.S.C. § 121. The law limits this authority to initial applications having either distinctly or independently claimed inventions. Unrelated inventions cannot be used together and have different modes of operation. The Examiner's notes to MPEP § 806.06, Note 1 explains, "[The form paragraph] is to be used only when claims are presented to unrelated inventions e.g. a necktie and a locomotive bearing not disclosed as capable of use together." If the Examiner cannot argue that Species I and II are independent inventions, the Examiner must then argue the inventions are distinct. MPEP § 808.02 provides, "Where, however, the classification is the same and the field of search is the same and there is no clear indication of separate future classification and the field of search, no reason exist for dividing among related inventions." The Examiner must demonstrate how Species I and II are distinct.

While traversing the above restriction, Applicant provisionally elects Species II in accordance with MPEP § 818.03(b). Applicant reinstates the initially presented and cancelled claims in the Preliminary Amendment associated with the elected species, namely, claims 84–105 (formerly, claims

21-43). Applicant shall have the right to file the nonelected claims in a divisional or continuation application. All arguments made by the Applicant relating to the currently nonelected subject matter shall not be construed as admission that any such Examiner's argument or position is proper.

### **III. Conclusion**

The Commissioner is hereby authorized to charge any underpayment or credit any overpayment to Deposit Account No. 22-0259 or any payment in connection with this communication, including any fees for extension of time, that may be required. The Examiner is invited to call the undersigned if such action might expedite the prosecution of this application.

Respectfully submitted,

Dated: February 23, 2007

By: 

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